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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-927

BOARD OF GOVERNORS OF THE
FEDERAL RESERVE SYSTEM,
Petitioner,

v.

INVESTMENT COMPANY INSTITUTE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Page

TABLE OF AUTHORITIES i

OPINION BELOW 1

JURISDICTION 1

QUESTION PRESENTED 2

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT 2

ARGUMENT 6

I. THE DECISION BELOW INVOLVES A NARROW LEGAL ISSUE WITH LIMITED IMMEDIATE IMPACT 8

II. THE PETITION SHOULD NOT BE GRANTED TO REVIEW ISSUES WHICH WERE NOT RAISED, ARGUED OR DECIDED BELOW 10

III. THE DECISION BELOW IS CLEARLY CORRECT 14

CONCLUSION 21

TABLE OF AUTHORITIES

CASES:

Baker, Watts & Co. v. *Saxon*, 261 F. Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968) 15

Board of Governors of the Federal Reserve System v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978) ..19, 20

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 16

Ernst & Ernst v. *Hochfelder*, 425 U.S. 135 (1976) 20

Page

First National Bank v. *Missouri*, 263 U.S. 640 (1924) 15

Investment Company Institute v. *Camp*, 401 U.S. 617 (1971) ..... passim

STATUTES:

Bank Holding Company Act ..... passim
Section 4(c)(7), 12 U.S.C. § 1843(c)(7) 16, 17
Section 4(c)(8), *as amended*, 12 U.S.C. § 1843(c)(8) ..... passim

Banking Act of 1933 (the "Glass-Steagall Act") .. passim
Section 2(b), *as amended*, 12 U.S.C. § 221a(b) 18
Section 2(c), 48 Stat. 163 (1933), *repealed*, 80 Stat. 242 (1966) 18
Section 16, 12 U.S.C. § 24 Seventh 3, 14, 16
Section 20, 12 U.S.C. § 377 ..... 17, 18
Section 21, 12 U.S.C. § 378 ..... 3, 14, 16

Investment Company Act 9
15 U.S.C. § 80a-9(a) 9
15 U.S.C. § 80a-14(a) 9

Federal Reserve Act 18

80 Stat. 242 (1966) 18

REGULATIONS:

12 C.F.R. § 225.4(a)(5)(ii) ..... passim

12 C.F.R. § 225.125 ..... passim

Page

LEGISLATIVE HISTORY:

S. Rep. No. 1179, 89th Cong., 2d Sess. (1966) 18

Senate Comm. on Banking and Currency, 89th Cong., 1st Sess., Analyses of S. 2353, S. 2418, & H.R. 7371 (Comm. Print 1965) 18

102 Cong. Rec. 6128 (1956) 17

102 Cong. Rec. 6130 (1956) 17

102 Cong. Rec. 6131 (1956) 17

MISCELLANEOUS:

Securities Subcommittee of Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., Securities Activities of Commercial Banks—Study Outline (Comm. Print 1975) 10

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (App. A of Petition) is reported at 606 F.2d 1004.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, under Section 4(c)(8) of the Bank Holding Company Act, the Federal Reserve Board may authorize bank holding companies and their non-bank subsidiaries to sponsor, organize and control closed-end investment companies.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in Appendices F and G to the Petition.

STATEMENT

Respondent Investment Company Institute ("ICI") is the national association of open-end investment companies, their investment advisers and principal underwriters. This case arises out of ICI's successful challenge to a portion of a regulation and interpretive ruling which were promulgated by the Federal Reserve Board in light of this Court's decision in *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971).

In *Camp,* the Court addressed the following issue: "whether the Comptroller of the Currency may, consistently with the banking laws, authorize a national bank to offer its customers the opportunity to invest in a stock fund created and maintained by the bank." *Id.* at 621.[1] The Court held that the Comptroller had erred in determining the bank's involvement in the fund to be lawful. It stated: "We conclude that the operation of an investment fund of the kind approved

[1] As the Court noted: "Before 1963 national banks were prohibited by administrative regulation from offering this service." 401 U.S. at 621.

by the Comptroller involves a bank in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act." *Id.* at 639.

The Court premised its decision on several grounds, including the concern of Congress, when it enacted the Glass-Steagall Act, that public confidence in banks not be impaired by their association in any manner with opportunities for general investment:

> "A bank that operated an investment fund would necessarily put its reputation and facilities squarely behind that fund and the investment opportunity that the fund offered. The investments of the fund might be conservative or speculative, but in any event the success or failure of the fund would be a matter of public record. Imprudent or unsuccessful management of the bank's investment fund could bring about a perhaps unjustified loss of public confidence in the bank itself." *Id.* at 637.

The Court emphasized that, in enacting the Glass-Steagall Act:

> "Congress feared that the promotional needs of investment banking might lead commercial banks to lend their reputation for prudence and restraint to the enterprise of selling particular stocks and securities, and that this could not be done without that reputation being undercut by the risks necessarily incident to the investment banking business." *Id.* at 632 (footnote omitted).

Following the *Camp* decision, on January 20, 1972 the Board promulgated the regulation and interpretive ruling that are in issue. It determined that, subject to certain conditions, bank holding companies and

their non-bank subsidiaries may act as investment advisers to various types of investment companies, including open-end investment companies, or "mutual funds." 12 C.F.R. § 225.125(c). However, in the case of open-end investment companies, the Board ruled that bank holding companies cannot lawfully do more than render investment advice: "In the Board's opinion, the Glass-Steagall Act provisions, as interpreted by the U.S. Supreme Court, forbid a bank holding company to sponsor, organize or control a mutual fund." 12 C.F.R. § 225.125(f).

Thus, with respect to *open-end* investment companies, the Board extended the *Camp* prohibition against a bank's sponsoring an investment fund to bank holding companies and their non-bank subsidiaries. However, with respect to *closed-end* investment companies, the Board carved out an exception to the *Camp* prohibition on the theory that such companies typically are engaged in securities activities less frequently.[2] On this basis, the Board authorized bank holding companies and their non-bank subsidiaries to sponsor, organize and control closed-end investment companies. 12 C.F.R. § 225.125(f).

It was this aspect of the Board's ruling that ICI challenged in the Court of Appeals.[3] ICI asserted that bank holding company sponsorship of closed-end investment companies is no more lawful than sponsor-

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[2] In contrast with open-end investment companies, closed-end investment companies do not typically stand ready to redeem their shares at any time and, after initial organization, issue new shares less frequently.

[3] The procedural history of ICI's efforts to seek administrative or judicial relief with respect to the regulation in issue is adequately set forth in the Petition at pp. 7-8.

ship of open-end investment companies. ICI requested, therefore, that the Board be directed "to rescind amended Regulation Y insofar as it authorizes bank holding companies and their bank and non-bank subsidiaries to sponsor, organize or control closed-end investment companies."[4]

In response to ICI's petition, a unanimous panel of the Court of Appeals for the District of Columbia Circuit vacated the challenegd regulation. In so doing, the Court of Appeals carefully limited its decision to the issue before it. Judge McGowan's opinion, as amended, states:

> "The Board found . . . that bank holding companies could act as investment advisers to mutual funds so long as they did not sponsor, organize or control them. . . . Petitioner challenged even this limited authorization before the Board, . . . but has not renewed that argument on judicial review. . . . Under these circumstances, we do not reach, and are not to be taken as expressing any view on, the question of whether bank holding companies and their non-bank subsidiaries may, either under the present regulation or one more narrowly drawn, render solely investment advice to closed-end investment companies, as distinct from sponsoring, organizing, managing, or controlling such companies." App. A of Petition at pp. 8a, 48a-49a.[5]

The Court of Appeals therefore was not asked to address, and expressly did not address, the lawfulness of any banking institution's rendering solely investment

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[4] *See, e.g.*, Brief for Petitioner at p. 49; Reply Brief for Petitioner at p. 17.

[5] The final sentence of this quotation was added to the Court of Appeals' opinion by order entered *sua sponte* on July 13, 1979.

advice to investment companies or any other type of enterprise.

Petitioner's request for rehearing or rehearing *en banc* in the Court of Appeals was denied on July 16, 1979 after supplemental briefing by both parties at the request of the court below.[6]

ARGUMENT

The issue presented by this case—whether bank holding companies and their non-bank subsidiaries may lawfully sponsor, organize and control closed-end investment companies—is a narrow one, the immediate impact of which is strictly limited. The facts of record show that only four closed-end investment companies have been sponsored by the nation's 2,222 bank holding companies pursuant to the authority granted by the challenged regulation and ruling.[7] The four companies so sponsored do not represent a major segment of the investment company industry, which consists of approximately 1,000 registered investment companies.

This case does not in any sense involve a determination of the lawfulness of a banking institution's rendering solely investment advice to any investment company—and most certainly does not involve the law-

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[6] In connection with the petition for rehearing or rehearing *en banc* in the Court of Appeals, briefs were also submitted, although not accepted by the Court, on behalf of all but one of the *amici* who have appeared in support of the Petition for Certiorari.

[7] The Court of Appeals agreed with the Board's position below that the challenged regulation authorizes activities only by bank holding companies and their non-bank subsidiaries, and authorizes no activity at all by banks. App. A of Petition at pp. 22a-23a.

fulness of investment advice given to any other institutions. The Court of Appeals expressly stated:

> "[W]e do not reach, and are not to be taken as expressing any view on, the question of whether bank holding companies and their non-bank subsidiaries may, either under the present regulation or one more narrowly drawn, render solely investment advice to closed-end investment companies . . . ." App. A of Petition, at pp. 48a-49a.

To the extent that Petitioner believes that the scope of permissible bank holding company activities—apart from sponsorship of closed-end investment companies—has been made unclear by the decision below, ICI respectfully submits that it would be appropriate for Petitioner to attempt to replace the challenged regulation with "one more narrowly drawn," as suggested by the Court of Appeals. Instead, Petitioner prematurely asks this Court to consider aspects of the regulation which were not challenged below and which the Court of Appeals, therefore, did not address.

On the narrow issue the Court of Appeals was asked to decide, and did decide, the decision below was manifestly correct. Section 4(c)(8) of the Bank Holding Company Act allows bank holding companies and their non-bank subsidiaries to engage in only a slightly wider range of activities than banking *per se*: that is, those activities determined by the Board "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8). When Congress delegated to the Board responsibility to determine that particular activities are sufficiently "closely related to banking" to be permitted to bank holding companies, it did not intend

that the Board would allow bank holding companies to engage in the very activities that Congress, in the Glass-Steagall Act, expressly forbade to banks themselves. This view is supported by both the language of the Act and, as analyzed extensively in the Court of Appeals opinion, by the pertinent legislative history. Unless this Court's decision in *Camp* can be read as prohibiting bank sponsorship of only open-end investment companies, and not of closed-end companies —a distinction for which there is no support in the *Camp* decision—there is no lawful basis upon which the Board could properly authorize bank holding companies to sponsor, organize and control closed-end investment companies.

1. The Decision Below Involves A Narrow Legal Issue With Limited Immediate Impact

Petitioner points to the fact that there exists a variety of relationships between banks, banking-related organizations and different types of investment companies. In an attempt to invest this case with a broad public interest, Petitioner implies the probability of widespread repercussion in the banking and investment company industries if the decision below is sustained. For example, the Petition asserts that in 1976 "the largest 115 banks and their nonbank affiliates provided *some form of investment advice* to 159 investment companies . . . ." Petition at p. 11 n.12 (emphasis added.)[8]

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[8] The SEC study cited by Petitioner is not part of the record. Although it is unclear what the cited portion shows, it is clear that the study is not relevant to the issue raised in this case. It appears from the SEC material that 159 investment companies received "some form" of investment advice from banks and their non-bank affiliates. However, "advice" is not an issue in this case. The issue is *sponsorship*, which is not addressed by the SEC study.

Petitioner omits, however, to state the number of investment companies which actually have been sponsored, organized or controlled by bank holding companies or their non-bank subsidiaries pursuant to the challenged regulation. On the facts of record, there appear to be only four such investment companies.[9] *See, e.g.,* App. E of Petition at p. 67a.

As the Petition observes, there are over 2,200 registered bank holding companies in operation. There are approximately 1,000 registered investment companies. Nevertheless, between 1972, when the challenged regulation first became effective, and 1977, when ICI filed the applicable petition for reconsideration with the Board, only four bank holding companies had sponsored closed-end investment companies which operated at the time of the Petition.[10] Moreover, based upon the statistics and sources cited by Petitioner, the total net assets of the ten closed-end investment companies which are currently managed by any kind of banking organization—including the six advised by banks and therefore not authorized directly by the challenged regulation—amount to approximately only

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The SEC data do not show which, if any, of the investment companies involved in the study may have been sponsored by the banking institutions that responded to the SEC's questionnaire. As we note, the facts of record show that four investment companies were sponsored under the challenged regulation—not 159.

[9] The record also contains evidence that eight additional closed-end investment companies had been sponsored by bank subsidiaries of bank holding companies. *See, e.g.,* App. E of Petition at p. 67a. As noted, the Board denies that the challenged regulation authorizes this activity by banks. *See* n. 7, *supra.*

[10] It should be noted that, if other bank holding companies had any commercial urge to enter the investment company business, they easily could have done so. The statutory requirements for entry into the business under the Investment Company Act are not burdensome. *See, e.g.,* 15 U.S.C. §§ 80a-9(a) and 80a-14(a).

one percent of the total assets of registered investment companies in the United States.

Thus, while the Petition claims that "[b]y prohibiting bank holding companies from organizing closed-end investment companies, the decision of the court of appeals will curtail the creation of new closed-end companies" (Petition at p. 12 (footnote omitted)), as a practical matter any adverse competitive impact will not be great. Moreover, whether or not the impact of the prohibition can be justified to further other important social policies is not a judgment Petitioner is free to make; Congress has already addressed the issue, as this Court noted in *Camp,* and made a dispositive determination:

> "The Glass-Steagall Act reflected a determination that policies of competition, convenience, or expertise which might otherwise support the entry of commercial banks into the investment banking business were outweighed by the 'hazards' and 'financial dangers' that arise when commercial banks engage in the activities proscribed by the Act." 401 U.S. at 630 (footnote omitted).

Congress has shown no disposition to change this policy, although it has periodically re-examined the issue of bank involvement in the securities business. *See, e.g.,* Securities Subcommittee of Senate Comm. on Banking, Housing and Urban Affairs, 94th Cong., 1st Sess., Securities Activities of Commercial Banks—Study Outline (Comm. Print 1975).

II. The Petition Should Not Be Granted To Review Issues Which Were Not Raised, Argued Or Decided Below

Petitioner observes that "[a]s a part of their ordinary banking business, banks have traditionally pro-

vided a wide range of fiduciary and financial advisory services that involve transactions in securities." Petition at p. 10. The *amici* herein argue that the Court of Appeals decision "has needlessly cast a shadow over a broad spectrum of services that historically have constituted a significant part of the business of many banks of all sizes, including especially customary investment management and advisory services." Memorandum of the American Bankers Association As *Amicus Curiae* at p. 3. However, in its present posture, this case does not involve the lawfulness of the rendering of investment advice or any other traditional "fiduciary" activity of banks with respect to investment companies—much less with respect to real estate investment trusts, small business investment companies or pooled employee benefit plans.[11] *See* Petition at p. 13.

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[11] We note that some individual members of the banking organizations appearing as *amici* apparently consider the decision as having a rather less broad impact than that suggested by the briefs of the *amici* in this Court. For example, on June 5, 1979, Citibank, N.A.—one of the twelve members of the New York Clearing House Association—stated the following with respect to the scope of the Court of Appeals decision:

> "In view of the limited focus of the analysis, it seems reasonable to conclude that the regulation and ruling were vacated because they permitted bank holding companies and their non-bank subsidiaries to sponsor, organize or control funds. There is no indication that the court intended to preclude bank holding companies and their subsidiaries from advising funds which they do not operate, whether open-end or closed-end." Letter from Patrick J. Mulhern, Vice President, Citibank, N.A. to John E. Shockey, Esq., General Counsel, Comptroller of the Currency, dated June 5, 1979 at p. 4.

Similarly, MoneyMart Assets, Inc.—an investment company advised by Continental Illinois National Bank and Trust Company of Chicago—states in its current Prospectus that, in the opinion of its counsel, the decision below does "not apply to bank or non-bank subsidiaries of bank holding companies which act as investment advisers to either closed-end or open-end investment com-

In *Camp*, this Court held that federal banking legislation prohibited a *bank* from directly sponsoring an investment fund that operated like an investment company. Subsequent to *Camp*, and, we submit, correctly applying the principles of that decision, the Board promulgated a regulation which it interpreted as prohibiting bank holding company sponsorship of open-end investment companies. Simultaneously, however, the Board purported to authorize bank holding company sponsorship of closed-end investment companies. It was this aspect of the Board's position that ICI challenged in the Court of Appeals.

This case does not involve the rendering of solely investment advice by banking institutions. The challenged regulation and interpretive ruling explicitly authorized *sponsorship* by bank holding companies of closed-end investment companies. The bank holding companies that acted pursuant to the authority of the regulation explicitly acknowledged *sponsorship* of the closed-end companies in question in their filings with the Securities and Exchange Commission. *See* Record at 1246, 1512 and 2162. The Court of Appeals decision explicitly addresses only the issue of *sponsorship*:

> "[W]e do not reach, and are not to be taken as expressing any view on, the question of whether bank holding companies and their non-bank subsidiaries may, either under the present regulation or one more narrowly drawn, render solely investment advice to closed-end investment companies, as distinct from sponsoring, organizing, managing, or controlling such companies." App. A of Petition at pp. 48a-49a.

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panies which they do not sponsor, organize or control." Prospectus filed with the Securities and Exchange Commission dated April 19, 1979 (File No. 2-55301) at 16.

To be sure, there may be instances where sponsorship exists by reason of the facts of a particular case, even though sponsorship is not expressly admitted.[12] This is especially true in the investment company industry, where, as the Board has acknowledged, investment companies are traditionally sponsored by their investment advisers. 12 C.F.R. § 225.125(e). However, further review of this case will not help to elucidate the limits of sponsorship. Here, sponsorship was expressly authorized by the challenged regulation and ruling, and sponsorship was expressly acknowledged by the bank holding companies that acted pursuant to the regulation. The limits of "sponsorship" are not in contention.

If, notwithstanding the explicit limitations the Court of Appeals placed upon its holding, either the Board or the *amici* herein still perceive that the decision "leaves in its wake an unsettled regulatory climate" (Memorandum of the American Bankers Association As *Amicus Curiae* at p. 3), we respectfully suggest that the Board might accept the invitation of the Court of Appeals to promulgate a new regulation with respect to investment advice which does not authorize sponsorship of closed-end investment companies. In

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[12] The existence of a contractual advisory relationship establishing full discretionary investment management authority and its ordinary incidents might be one factor, among others, to be considered in determining, on the facts of a particular case, whether a bank holding company goes beyond simply acting as an investment adviser and actually sponsors, organizes or controls an investment company. However, Petitioner sets up a straw man insofar as it argues that the Court of Appeals may have intended *per se* to prohibit discretionary investment management by deciding that bank holding companies may not sponsor closed-end investment companies. *See* Petition at p. 12. The Court of Appeals decision merely places closed-end investment companies on the same footing as open-end investment companies in this regard.

doing so, the Board could, if it chose, hold a hearing to obtain all pertinent facts, and weigh them in applying its acknowledged expertise. Such facts are more readily obtainable by the Board than by this Court. Certainly, this Court should not grant certiorari to decide in the first instance a variety of complex issues pertaining to federal banking legislation which the Court of Appeals was not asked to address; which the Court of Appeals expressly refrained from addressing; and which could not be addressed on the record in this proceeding.

III. The Decision Below Is Clearly Correct

With respect to the issue the Court of Appeals was asked to reach and did reach—that is, whether bank holding companies may lawfully sponsor closed-end investment companies—the decision below is clearly correct.

After a searching examination and analysis of the legislative history, a unanimous panel of the Court of Appeals, speaking per Judge McGowan, found that Section 4(c)(8) of the Bank Holding Company Act does not permit the Federal Reserve Board to authorize the sponsorship, organization and control of closed-end investment companies by bank holding companies. While in relying on Section 4(c)(8), the Court of Appeals decided the case on an alternative ground suggested by ICI, the significance of Section 4(c)(8) was briefed fully in connection with Petitioner's petition for reconsideration in the Court of Appeals.[13] Most importantly, the result is clearly the right one.

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[13] The Court of Appeals did not accept ICI's contention that Sections 16 and 21 of the Glass-Steagall Act directly prohibit the sponsorship of closed-end investment companies by bank holding

1. The Court of Appeals' decision, contrary to Petitioner's assertions, has the merit of conforming to the plain meaning of the statutory language and to common sense. It is simply incongruous to suggest, as does Petitioner, that Congress could have intended that activities which are expressly forbidden to banks by statute can nonetheless "be so closely related to banking . . . as to be a proper incident thereto."

National banks have always been limited to the exercise of only those powers expressly conferred upon them or those which are necessarily incidental to the kind of banking which they are authorized to transact. *See, e.g., First National Bank* v. *Missouri,* 263 U.S. 640 (1924). However, after the experience of the Great Depression, Congress was no longer satisfied that the traditional doctrine of *ultra vires* was sufficient to protect the public in the case of securities activities by banks. When Congress passed the Glass-Steagall Act in 1933, it reached out *explicitly to prohibit* securities activities by banks and their affiliates. The background of the Glass-Steagall legislation

> "conclusively demonstrates that it was the unalterable and emphatic intention of Congress to divorce commercial banks from the business of underwriting and dealing in securities." *Baker, Watts & Co.* v. *Saxon,* 261 F. Supp. 247, 252 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.,* 392 F.2d 497 (D.C. Cir. 1968).

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companies. Instead, the Court of Appeals found the Glass-Steagall Act relevant only insofar as it serves to inform the meaning of Section 4(c)(8) of the Bank Holding Company Act. ICI did, however, argue below that the challenged activity could not lawfully be authorized under the Bank Holding Company Act. ICI reserves its right to argue that either statutory basis would properly support the result below.

As this Court held in *Camp*, Congress intended Sections 16 and 21 of the Glass-Steagall Act to prohibit banks from sponsoring investment funds.

In the Bank Holding Company Act of 1956, Congress enacted for the first time a detailed and comprehensive system of bank holding company regulation with respect to non-banking activities of all kinds which were then being conducted through the bank holding company device. The Bank Holding Company Act required bank holding companies to divest themselves of *all* their non-banking businesses, except insofar as expressly authorized by various specific exceptions in the Act.

Section 4(c)(8) of the Act, as amended, is such an exception. It allows bank holding companies and their non-bank subsidiaries to engage in a slightly wider range of activities than banking *per se*: that is, those activities determined by the Board "to be so closely related to banking or managing or controlling banks as to be a proper incident thereto." 12 U.S.C. § 1843 (c)(8). However, surely activities which are *expressly forbidden* to banks—and not merely *ultra vires*—cannot reasonably be construed as being "so closely related to banking, . . . as to be a proper incident thereto."

2. The Court of Appeals decision is solidly grounded on the legislative history. Petitioner's arguments to the contrary are without merit.[14]

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[14] Petitioner's suggestion that Section 4(c)(7) of the Bank Holding Company Act authorizes the operation of a closed-end investment company reflects "appellate counsel's *post hoc* rationalizations for agency action . . . ." *Investment Company Institute* v. *Camp*, 401 U.S. 617, 628 (1971), quoting *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). In the

Contrary to Petitioner's assertions, Section 20 of the Glass-Steagall Act is not the relevant provision with which to interpret the lawfulness of securities activities engaged in by bank holding companies and their non-bank subsidiaries under the Bank Holding Company Act. In the first place, as the Board conceded below, Section 20 did not apply to bank holding companies and their non-bank affiliates when the Bank Holding Company Act was enacted in 1956, and could not have become applicable until at least ten years later. *See* Petition for Rehearing and Suggestion for Rehearing *En Banc* at pp. 7-8. Yet the limitations on the securities activities which are permitted to bank holding companies remain the same today as when the legislation was first enacted in 1956. When the Bank Holding Company Act was amended in 1970, the legislative history made it clear that the Congress resolved "that bank holding companies were not to engage in the securities business beyond what was permitted in the 1956 Act." App. A of Petition at 36a.[15]

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administrative proceeding before it, the Board never placed reliance on this provision. Moreover, as the legislative history of the 1956 predecessor of Section 4(c)(7) makes clear, all that section does is permit a bank holding company to make certain of the same investments indirectly through a corporate subsidiary that it could itself make directly. *See* 102 Cong. Rec. 6128 (1956) (remarks of Senator Barkley). Section 4(c)(7) was intended to be a narrow, "technical amendment," *see id.* at 6130 (remarks of Senator Robertson), drafted with a specific bank holding company and wholly-owned subsidiary in mind, *see id.* at 6131 (same). The ownership of a subsidiary investment company is a far different activity from the sponsorship of a closed-end investment company whose shares are issued, offered, sold, and distributed to the *public*. It is the latter activity that is not authorized to bank holding companies by Section 4(c)(8).

[15] Before it was determined to leave the 1956 standard intact, there was some controversy between the Senate and the House concerning the permissibility of securities activities under a

Moreover, even if Section 20 ultimately became applicable to bank holding companies,[16] it should be emphasized that Section 20 does not *authorize* any activity; it *prohibits* certain securities activities by affiliates of member banks. It is of no consequence that Section 20 may not explicitly prohibit *all* the activities which fail to meet the "closely related to banking" standard of Section 4(c)(8).

In short, the legislative history of Section 4(c)(8) and its predecessor compels the same conclusion as that mandated by the plain meaning of the statute. The Board lacks the power to authorize as "closely related to banking," within the meaning of Section 4(c)(8), activities, such as the sponsorship of closed-end investment companies, that Congress has expressly forbidden to banks. The result reached by the Court of Ap-

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revised Section 4(c)(8). However, the legislative history cited in the Petition at pp. 17-18 & n.25 evidences nothing more than that Congress was aware of the then-pending litigation with respect to the Comptroller's regulation authorizing bank-operated commingled agency accounts. This Court ultimately held that regulation unlawful in *Camp*.

[16] In 1966 the definition of "affiliate" in Section 2(b) of the Glass-Steagall Act, *codified as amended*, 12 U.S.C. § 221a(b), was amended to include a provision substantially similar to the repealed Section 2(c) definition of "holding company affiliate," *see* 80 Stat. 242 (1966). It is unlikely that Congress intended by this amendment to make Section 20 applicable to bank holding companies. This possible consequence of its actions certainly went unnoticed by Congress. The purpose of expanding the Section 2(b) definition was, rather, to save from the general repeal of the holding company affiliate provisions certain provisions of the Federal Reserve Act relating to reports on holding company affiliates and to render applicable to holding company affiliates other provisions of the Federal Reserve Act relating to examinations of affiliates of member banks. See S. Rep. No. 1179, 89th Cong., 2d Sess. 12-13 (1966); Senate Comm. on Banking and Currency, 89th Cong., 1st Sess., Analyses of S. 2353, S. 2418, & H.R. 7371 at 19 (Comm. Print 1965).

peals is the only one consonant with the purpose of Section 4(c)(8) to further the Glass-Steagall Act goal "of divorcing investment from commercial banking." App. A of Petition at p. 30a. Despite Petitioner's attempt to portray sponsorship of investment companies as similar to various fiduciary and financial advisory services, involving securities, in which banks have traditionally engaged, the Court of Appeals saw the obvious distinction between fiduciary activities and the sponsorship of an investment company whose shares are marketed to the general public. This Court drew the same distinction in *Camp*:

> "No provision of the banking law suggests that it is improper for a national bank to pool trust assets, or to act as a managing agent for individual customers, or to purchase stock for the account of its customers. But the union of these powers gives birth to an investment fund whose activities are of a different character." 401 U.S. at 624-25.

3. The Court of Appeals accorded appropriate deference to the Board's expert discretion, to the extent possible in the face of the overwhelming evidence of contrary legislative intent.

The Court of Appeals expressly noted and considered the "high degree of deference" to which the Board's construction of the Act would ordinarily be entitled in light of this Court's decision in *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234 (1978). However, speaking for the unanimous panel of the Court of Appeals, Judge McGowan also noted that the court could not abdicate its duty in the final instance to say what the law is:

> "The rulemaking power granted to an administrative agency charged with the administration

> of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by statute.'" *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 213-14 (1976) (citations omitted).

The Court of Appeals' conclusion was "emphatically that section 4(c)(8) does not empower the Board to authorize conduct of the type at issue here." App. A of Petition at pp. 24a-25a.

Consistent with *First Lincolnwood,* however, the Court of Appeals carefully limited its ruling and virtually invited the Board to attempt to reformulate a lawful regulation:

> "[W]e do not reach, and are not to be taken as expressing any view on, the question whether bank holding companies and their non-bank subsidiaries may, either under the present regulations *or one more narrowly drawn,* render solely investment advice to closed-end investment companies, as distinct from sponsoring, organizing, managing, or controlling such companies." App. A of Petition at p. 48a (emphasis added).

To date, the Board has not accepted the Court of Appeals' invitation to attempt to clarify the scope of permissible activities. Instead, it asks this Court to provide such guidance in the first instance. For the reasons stated *supra,* ICI submits that a writ of certiorari should not issue for this purpose.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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